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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, et al.,

Petitioners,

— v. —

JOHNSON CONTROLS, INC.,

Respondent.

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS BY TRIAL LAWYERS FOR PUBLIC JUSTICE

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BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS BY TRIAL LAWYERS FOR PUBLIC JUSTICE

INTEREST OF THE AMICUS*

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm dedicated to using the skills and approaches of plaintiffs' trial lawyers to advance the public good. Supported by and working through a nationwide network of over 750 of the country's outstanding trial lawyers, TLPJ brings precedent-setting and socially significant cases designed to advance consumer and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employee rights, and the protection of the poor and the powerless.

* This brief *amicus curiae* is being filed with the consent of the parties. The parties' written consents are on file with the Clerk of the Court.

TLPJ is particularly interested in this case because it presents the question of whether two battles TLPJ routinely wages - - the battle against sex discrimination and the battle for workplace safety - - will be treated as contradictory or, as Congress mandated, complimentary. In addition, because the majority below decided the issues presented without a trial, this case also presents a question of critical importance to virtually all victims and potential victims of toxic torts: whether courts may simply disregard the results of animal studies and hold that, unless and until enough people have been injured or killed to permit a statistically significant sample to be epidemiologically studied, no inference of causation can properly be drawn.

SUMMARY OF ARGUMENT

While we agree with many of the arguments advanced by the appellants and the other *amici*, there are three fundamental flaws in the decision below that are particularly disturbing. We write separately to stress these three critical, fundamental flaws.

First, both the majority opinion below and, to some extent, Judge Posner's dissent utterly disregard the fact that Johnson Controls' so-called "fetal protection policy" is nothing of the sort. In reality, the policy is only tenuously related to fetal protection and is based on long-discredited stereotypes that trample on women's autonomy. Moreover, the company's assertions of "moral concern" for fetal health are severely undermined by the risks to employee and consumer health that Johnson Controls routinely creates and tolerates.

Second, both the majority opinion below and Judge Posner's dissent seriously err by suggesting that the bona fide occupational qualification ("BFOQ") defense is broad enough to encompass an employer's "ethical, legal, and business concerns about the effects of its activities on third parties" or other "social costs" like potential tort suits by future children of its

employees. The "social costs" related to toxic workplaces are so open-ended that permitting such costs to be evaluated as part of a BFOQ defense would overwhelm Title VII trials with social policy judgments better left to Congress. Furthermore, on this question, Congress has plainly spoken: "social costs" like potential tort liability are not proper components of a Title VII defense.

Third, regardless of whether its interpretation of Title VII is correct, the majority opinion below improperly entered summary judgment in Johnson Controls' favor because it did so in the face of animal studies presented by plaintiffs that showed that the levels of lead exposures from which the company sought to protect women (in the name of protecting fetuses) are also dangerous to men. The majority's wholesale rejection of animal studies is legally and scientifically untenable. Plaintiffs' animal study evidence, without more, requires reversal.

INTRODUCTION

We believe that the Johnson Controls' policy at issue in this case, is, inescapably, overt, facial discrimination on the basis of sex and capacity to become pregnant. Consequently, according to the clear language and intent of Title VII, as amended by the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. 2000e(k), the only defense available to the employer is that lack of capacity to become pregnant is a BFOQ; this defense may only focus on the ability of *substantially all* adult women to perform the work. *Western Air Lines v. Criswell*, 472 U.S. 400 (1985). The arguments we advance in this brief, however, are equally applicable to the business necessity defense. Regardless of whether this Court finds the BFOQ or the business necessity defense to be mandated by Title VII, the majority below erred by granting summary judgment in defendant's favor.

I. JOHNSON CONTROLS' "FETAL PROTECTION POLICY" HAS LITTLE TO DO WITH FETAL PROTECTION AND A LOT TO DO WITH SEX DISCRIMINATION.

The majority opinion below and Judge Posner's dissent, like the decisions in *Wright v. Olin*, 697 F.2d 1172, 1189-90 (4th Cir. 1982), and *Hayes v. Shelby County Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984) (general societal interest in having enterprises be protective of health of unborn children provides business necessity for policy excluding women from employment), contort facial Title VII law and utterly disregard the plain language of the PDA.[1] They do so because of well-intentioned concerns about fetal health. To properly evaluate Johnson Control's exclusionary policy, as well as the arguments about the relevance of moral concerns and social costs to Title VII defenses, however, these concerns must be put into perspective.

The admirable concern that our toxic world be made safer for the sake of future generations, when applied to this case, merely obfuscates the fact that the connection between the Johnson Controls policy and the health of babies or fetuses is tenuous and speculative. What is not tenuous or speculative, however, is the immediate harmful impact of the policy on existing human beings, both male and female. Existing women are denied well-paying jobs and advancement opportunities and are branded with the stigma of being regarded as marginal, expendable workers. Existing men are virtually foreclosed from working in the jobs with the lowest levels of lead exposure, both

[1] Commentators who have analyzed *Olin* and *Hayes* are uniformly critical of their reasoning, assumptions, and troubling contortions of Title VII law and precedent. *See, e.g.*, Becker, "From *Muller v. Oregon* to Fetal Vulnerability Policies," 53 *U. Chi. L. Rev.* 1219 (1986); Finley, "The Exclusion of Fertile Women from the Hazardous Workplace: The Latest Example of Discriminatory Protective Policies, or a Legitimate, Neutral Response to an Emerging Social Problem?," Proceedings of the N.Y.U. Thirty-Eighth Annual Nat'l Conf'c on Labor, Ch. 16 (Mathew Bender & Co. 1985).

because women have been transferred into these jobs and because men's concerns about reproductive health are ridiculed at Johnson Controls.[2]

A. Johnson Controls' Policy is Based on a Web of Speculation About the Number of Women Who Might Get Pregnant and Who Might Have Children Adversely Affected by Lead.

Johnson Controls' designation of its policy as a "fetal protection policy" is a misnomer. The policy applies whether or not a fetus is extant. The women to whom it applies are not pregnant, and many of them have no plans to become pregnant, or are long past their childbearing days, or are responsible users of contraceptives. The policy does not protect fetuses other than in the most indirect, attenuated sense. Rather, what it does do, directly and immediately, is exclude existing adult women from entire job categories and promotion opportunities, simply because women have the biological ability to become pregnant. All of the professed "moral concern" about fetal health boils down to the following chain of reasoning: because women can get pregnant, and because some of them *might* get pregnant, and some of these who get pregnant *might* have high blood lead levels, and then perhaps some of the children born to these women *might* have some developmental problems, in order to avoid this slight possibility, we must refuse to hire *all* women who are physically capable of bearing children.

This major leap - - from the fact that *in utero* lead exposure can cause cognitive development and social adjustment

[2] Donald Penney, one of the named plaintiffs in this case, charged in his E.E.O.C. complaint that his ability to bid for low level lead jobs is greatly restricted by the Johnson Controls' Fetal Protection Policy, since it gives transfer preference to women. He also charged that, when he requested a leave of absence in order to lower his blood lead levels because he wanted to father a child, he was subjected to such a level of harassment as to constitute constructive discharge. J. App. 66-69.

problems in children to the conclusion that all fertile, but not necessarily pregnant, women must be barred from employment - - is fraught with analytic and policy pitfalls.

B. Restricting Women's Employment Opportunities Because of The Capacity of Women to Become Pregnant Has Long Been Discredited as Based on Stereotypes That Trample on Women's Autonomy.

Justification of restrictions on women's employment opportunities because of their capacity to bear children and attendant concern about social cost and the well-being of future generations is the most venerable and prevalent excuse for sex-based employment discrimination. This sad fact was frequently recognized by the proponents of the Pregnancy Discrimination Act. *See, e.g.*, Sen. Rep. No. 95-331, 95th Cong., 1st Sess. 2-3 (1977); H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 2-3 (1978). Indeed, the justifications offered by Johnson Controls and by the majority below bear a startling resemblance to the long-discredited turn-of-the-century reasoning in *Muller v. Oregon*, 208 U.S. 412 (1908), in which Chief Justice Brewer, writing for the Court, upheld a statute limiting employment of women, out not men, because "healthy mothers are essential to vigorous offspring, [and] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Id.* at 421. And, the restriction was necessary "largely for the benefit of all." *Id.* at 422. Due to the recognition that excluding women in the name of "protecting" them and future generations fails to treat women as autonomous individuals and forever chains them to their reproductive role, state legislation aimed at "protecting" women out of jobs was swept aside by Title VII almost twenty years ago. See, e.g., *Rosenfield v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971); J. Baer, *The Chains of Protection* (1978).

It is odd that, in the face of judicial interpretations of Title VII prohibiting state legislation that "protects" only women from occupational hazards, the majority below would allow a private employer to exclude women in the name of protecting potential offspring from the risks of only maternal, but not paternal, employment. Becker, *supra*, 53 *U. Chi. L. Rev.* at 1220. It is also distressing that, with the widespread adoption of fetal protection policies in the last few years, *id.*, women are still, despite the PDA and the long-ago demise of protective legislation, being forced to fight for their right to employment over claims that their childbearing capacity precludes that right. The subtle shift from the reasoning in *Muller* that it was *women* who were being protected, in the name of future generations, to Johnson Controls' reasoning that it is *potential fetuses* that must be protected, does not mask the fact that it is still women who are being excluded from employment.

The historical and contemporary exclusion of women from employment because of their childbearing capacity assumes that women are more socially important because of their reproductive function, and that their value as workers is marginal. In essence, women are reduced to their wombs. Moreover, women are presumed to be less capable and conscientious decision-makers about their reproductive desires and health than employers. Thus, fetal protection policies such as the one implemented by Johnson Controls invariably disrespect women's autonomy and individuality. Policies broadly exclusive of all fertile women callously disregard actual individuals' plans about marriage and childbearing and fail to contemplate that many working women are unlikely to have any more children. Thus, these policies plainly contravene *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), in that they exalt a generalizable biological difference between men and women into an excuse for not treating individual women as individuals.

Moreover, Johnson Controls arrogated to itself the judgment that any woman who did exercise her autonomous right to procreate despite her careful weighing of the risks of lead exposure versus the risks of unemployment and her family's need for her income was acting irresponsibly. Prior to 1982, Johnson Controls did not broadly exclude all women, because the company recognized that "not all women who can become mothers wish to become mothers," and that the decision whether to work in certain jobs "should properly be made by the individual immediately involved." J. App. 140. Yet Johnson Controls regarded its pre-1982 voluntary program, under which employees were informed of the risks and given counseling, a "failure", because, throughout the company's plants, eight women became pregnant in six years. (There is no evidence in the record that any of these women bore a child that showed any adverse effects from prenatal lead exposure.) Rather than regarding the occurrence of a pregnancy as a "failure," as an act engaged in by an irresponsible woman (in consultation with her irresponsible partner), the occurrence of so few pregnancies during such a long period of time at a large, nationwide company indicates the success of the previous policy, and the responsibility of autonomous women.

The insult to women's dignity and autonomy perpetrated by Johnson Controls is illustrated by the reactions of two women over fifty who were demoted to lower paying, lower status jobs at the Johnson Controls plant in Bennington, Vermont. In the words of a Boston Globe reporter who interviewed them, "[t]he company's contention that the mandatory transfer to low lead exposure jobs was for the protection of her future children sends a rush of red from [Virginia] Green's neck to her gray hairline, prompting her to ask rhetorically whether women are not bright enough to make sensible choices about their own reproductive lives. It prompts [Elsie] Nason, now 57 ... [to say] 'Ridiculous, and degrading. I've been divorced for 16 years. I felt they'd pointed a finger at me as if I was some shady lady going out and

getting pregnant. At my age! They took me off my job for foolishness and I'll be mad about it, and the smutty jokes I had to hear from the men about an old lady like me still having her period, until the day I die.'" Eileen McNamara, "Factory and Fertility," *Boston Globe* Oct. 17, 1989.

The majority below, however, was concerned that, given the importance of jobs and adequate income to "better [her] family's station in life, it would not be improbable that a female employee might somehow rationally discount" the risk to her fetus if she became pregnant. 886 F.2d at 897. This reasoning overlooks the fact that employers are just as likely to rationally discount the risk to women and their families from unemployment or reduced wages, since, once the woman is out of the workforce, any of her problems are simply no longer of any concern to the employer. As explained by Professor Mary Becker, "an employer faced with evidence that a group is hypersusceptible ... is likely to make the decision to exclude that group based, not on the costs and benefits to the workers and their families, but on the employer's need for members of that group in its labor force. If the group is very marginal – as women are in traditionally male jobs – the employer has every incentive to exclude the group's members even though the heightened risks may be very low ... and the benefits of allowing the group to work (benefits in this case to both women and to their children) are very high." Becker, *supra*, 53 *U. Chi. L. Rev.* at 1239-40. Title VII and the PDA were enacted to take away from employers the right to make such economic cost-benefit calculations about a group of workers perceived as marginal because of a characteristic – childbearing capacity – unrelated to their ability to do the job.

Another major analytic flaw of Johnson Controls' focus only on women as the locus of concern about the health of future generations is that the present policy totally ignores the male capacity to impregnate. Men contribute to the health of future

generations as well as women, and lead is highly toxic to men's fertility and sperm motility. The definition of the policy at issue in this case as a *fetal* protection policy means that the concern about reproductive health remains a narrow one, considering only one aspect of reproduction, only one way in which adverse reproductive outcomes can occur. And it means that the scrutiny will always remain on women, and on their role in reproduction, to the detriment of men's reproductive health.

While fears about developmentally impaired children can loom large in a company's mind, company decisionmakers are less likely to think about the children who are desperately wanted but never get conceived. They are less likely to think about the miscarriages suffered by a wife of a male worker because his sperm was damaged by lead exposure. But to the families who must live with the consequences of lead, the infertility or the pregnancy loss may be more of a tragedy, more of an endangerment to physical and mental health, than a wanted child who turns out to be less intelligent or capable than some of her peers.

C. Johnson Controls' Professions of "Moral Concern" Are Severely Undermined by the Amount of Risk to Worker and Consumer Health That The Company Routinely Tolerates as an Aspect of Lead Battery Manufacturing.

The channelling of all of the company's concern about reproductive health onto potential fetuses to the detriment of existing men and women leads to the untenable conclusion that only for fetuses – something that only women carry – shall there be absolutely no risk. The company's total intolerance for fetal risk starts to look suspiciously like a justification for discrimination when all of the other risks that it rationally, economically tolerates are taken into consideration. Johnson Controls countenances the high risk of cardiovascular damage from blood lead levels as low as 10ug/dl to its existing male

workers. It tolerates the risks to the environment and to the health of future generations from the disposal of lead batteries and other hazardous waste from the production process. It accepts some risk of harm to consumers from defective or exploding batteries. It tolerates risks to the children of workers from the workers bringing lead residues home on their clothing. It tolerates all sorts of risks to workers from innumerable conditions in and around its plants, ranging from slippery floors to repetitive motion injuries to cigarette smoke. When seen from the perspective of all of the risk that the company is willing to accept, the "moral imperative" for excluding women because some of them *might* some day choose to become pregnant starts to look more and more like a disingenuous rationalization for keeping women out of the workplace.

Against this background, which highlights the tenuous connection between a refusal to hire all fertile women of a broad age spectrum and protection of the health of future generations, arguments that "moral concern," "social cost," "ethical considerations," or economic fears about future liability costs should justify a radical departure from established law governing facial discrimination under Title VII and the PDA should be greeted with skepticism. These arguments are no more tenable a reason for barring women from employment opportunities today than they were in the early 1970's when Title VII was used to discredit the outdated 1908 ideology of *Muller v. Oregon*.

II. EXPANDING THE BFOQ DEFENSE TO INCLUDE CONSIDERATIONS OF MORAL CONCERNS AND SOCIAL COSTS, INCLUDING POTENTIAL TORT LIABILITY, WILL EVISCERATE TITLE VII AND UNDERMINE THE SAFETY-ENHANCING GOALS OF TORT LAW.

Both the majority and Judge Posner, dissenting below, suggested that the BFOQ defense ought to be broad enough to

encompass, as Judge Posner put it, an employer's concerns with the "normal operations" of a business, including "ethical, legal, and business concerns about the effects of its activities on third parties," and such "social costs" as potential tort suits by future children of employees. Such a wholesale expansion of the BFOQ defense was squarely rejected by Congress, when the Senate rejected a proposed amendment to Title VII that would have allowed discrimination whenever it would be "more beneficial to the normal operation of the particular business or enterprise involved or to the good will thereof than the hiring of an individual without consideration of his race, color, religion, sex, or national origin." 110 Cong. Rec. at 13825 (June 15, 1964). This Court should not let concern about potential harm to potential fetuses tempt it to open up what is supposed to be the most narrow defense to facial discrimination.

A. The Social Costs of Toxic Workplaces Are So Open-ended That Consideration of Them Would Overwhelm Title VII Trials With Social Policy Judgments Better Left to Congress.

At the end of this "social cost" path lies a tangle of judicially unmanageable speculations, that, if indulged, would swallow up Title VII's ban on discrimination on the basis of pregnancy and capacity to become pregnant. What social costs should employers and courts have to consider? And social costs to whom? And how large, or how certain, must the social cost be before it becomes a legitimate factor for consideration? If employers may consider potential risks to fetal health, should they not also have to consider potential risks to paternal health and maternal health? What about the costs to women and their children of unemployment or reduced wages and benefits? What about the cost to a woman's esteem and dignity from being told that she cannot have a certain job simply because she has a womb? What about the social cost of continuing to label women as marginal workers, creatures more valued for their reproductive than their productive capacity? What about the social cost of the perpetuation of some men's stereotyped attitudes about women's productive capabilities and social role? What about the social cost of perpetuating occupational segregation, and with it, the wage gap between men and women?

Many of these important social costs flowing from excluding women from certain jobs can be just as scientifically documented as the risks to fetuses from lead exposure. Yet to have to weigh all of these factors in assessing a BFOQ defense would surely turn Title VII trials into legislative policy sessions, evaluating the question of which social cost is of greater priority — the immediate harms to current workers from discrimination, or the possible future harm to nonexistent fetuses? Congress has already answered this question, and has made the judgment that a woman's ability to do the job is the only relevant factor for evaluating whether she may be excluded because of her capacity to become pregnant. 42 U.S.C. 2000e(k).

As the above questions illustrate, "social cost" analysis is entirely open-ended. Thus, allowing "moral concerns" about the social cost of the risk of maternal employment to fetal health to enter into either the BFOQ or business necessity analysis will swallow up Title VII's prohibition of sex discrimination. There is no logical line at which to end acceptance of professed concerns for fetal health. Just as lead and other toxins may pose a risk to fetuses, so may stress, fatigue, standing or sitting for long hours, and exposure to the colds, viruses, and cigarette smoke of other workers. So, should concern for fetal health permit employers to refuse to hire women for jobs deemed to be stressful, jobs that require standing long hours at assembly lines or service counters or in restaurants? Should employers be able to use concern for fetal health to justify forced leave for all women after a certain month of pregnancy, because the stress and fatigue risks of the job increase at that time? (This practice was declared unconstitutional when practiced by a public agen-

cy in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).) Should taxi and bus companies be able to refuse to hire women as drivers because, if they got pregnant and if they were in an accident, it would be not only them but their fetuses that might be injured? (It should be noted that the statistical risk of getting in an accident given the number of hours spent on the road by a professional driver is at least as high, if not higher, than the risk of lead exposure to a fetus.) Should employers be able to rely on child development studies that claim that very young children develop better intellectually and emotionally when given the constant attention of a primary parental caretaker in the home to refuse to hire women with young children, because those children will be better off with the mother at home than with the mother employed? (This sort of policy was declared to violate Title VII in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).) It does not take much of a march along this "parade of horribles" to understand how great an incursion on women's employment opportunities the "social cost of possible fetal harm" defense would permit.

While an employee's ability to perform the job safely has been a legitimate BFOQ and business necessity consideration, this factor properly includes only safety risks to co-workers and existing third parties such as customers. It cannot include safety risks even to actual fetuses. *See, e.g., Burwell v. Eastern Airlines*, 633 F.2d 361 (4th Cir. 1980), and *In Re National Airlines*, 434 F. Supp. 249 (S.D. Fla. 1977), in which courts upheld the exclusion of pregnant flight attendants from flying during the advanced stages of pregnancy because of evidence that late term pregnancy interfered with the ability safely to serve passengers, but rejected the argument that fetal safety also supported the exclusion, because judgment about what risks to accept for one's future child were best left to the mother and were of no legitimate concern to the airline. As mentioned in Part I of this brief, this conclusion is the only one consistent with respect for the autonomy and individuality of women.

After all, it is not the employer, but the woman and her family, who has to bear both the consequences of job loss or demotion and the consequences of any ensuing harm to a child. Those whose lives will be most directly affected by an event are the ones who should make the decision whether to bear the risk. Finley, *supra*, at 16-27-28.

B. Concern About Potential Tort Liability Is an Improper Component of a Title VII Defense.

Employers may assert that their businesses will be affected, however, if harm occurs to a child of a female employee, because that child may sue the employer in tort.[3] Concern about tort liability is essentially a cost concern, and cost has been emphatically rejected as a defense to facial sex discrimination by this Court in *City of Los Angeles Dep't of Water & Power v. Manhart*, *supra*. Even those courts that have allowed some expansion of Title VII defenses because of concern about fetal health have drawn the line at concern about future tort liability. As the 11th Circuit explained in *Hayes v. Shelby County Memorial Hospital*, *supra*, 726 F.2d at 1553 n.15:

> In today's litigious society, the potential for litigation rests in almost every human activity. For example, every employer faces the risk that a pregnant employee will encounter a workplace activity that would not normally be hazardous to a nonpregnant employee, but which could prove injurious to a developing fetus. These hazards range from slippery floors to uncontrolled cigarette smoke, asbestos,

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[3] While Johnson Controls has not asserted fear of tort liability as a justification for its policy, perhaps because liability is so speculative or because this justification is so clearly precluded by existing law, Judge Posner suggests that such fear should enter into BFOQ analysis. As an organization expert in tort law and dedicated to seeing the safety-enhancing goals of tort law respected, TLPJ is in a unique position to provide guidance on this matter.

> known and unknown carcinogenic materials used in the workplace and a plethora of other hazards of modern society. The employer is, of course, free to protect itself from financially ruinous lawsuits by purchasing insurance and by maintaining the degree of care required by law.

Because tort liability is a danger pervading everything manufacturers such as Johnson Controls do, it can hardly stand as an excuse for facial sex discrimination.

Johnson Controls faces a risk of tort liability for activities ranging from the manufacture of batteries to the disposal of batteries. The risk of future suits from subsequently born children of female employees is actually one of the slightest tort risks that it faces. The contemplation of these suits requires several more speculative steps beyond the speculation about the likelihood that a woman will get pregnant and bear a damaged child. If that happens, it is speculative whether the child will sue and, if so, whether the child will be able to mount sufficient proof of injury caused by maternal lead exposure, given all the other possible sources of lead exposure and possible causative factors for impaired development. Johnson Controls faces at least as great a risk of tort suits by children of male workers alleging that they were harmed by paternal lead exposure. Indeed, there have been several notable claims brought alleging birth defects due to paternal exposure to a toxin. See, e.g. *In Re Agent Orange Products Liability Litigation*, 611 F.Supp. 1223 (E.D.N.Y. 1985)(claims of children born to Vietnam Veterans alleging birth defects caused by paternal exposure to Agent Orange dismissed for failure to prove causation); *Mondelli v. United States*, 711 F.2d 567 (3d Cir. 1983) (suit alleging that paternal exposure to ionizing radiation during atomic testing caused plaintiff's birth defects); *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983)(same); 9 Occup. Safety & Health Rptr. (BNA) 339 (Current Report, Sept. 13, 1979) (describing claim

brought by male worker that his occupational exposure to DBCP caused deformities to his child); Judith Scott, "Keeping Women in Their Place", in W. Chavkin, Ed., *Double Exposure* 184-191 (1984) (describing claims of male railroad workers against Long Island Railroad that their children were born with hip deformities caused by paternal exposure to defoliants, and significant number of incidents of children of male pesticide workers fathering children with serious heart defects). In light of the reality that tort liability can come just as much from the children of male workers as those of female workers, it can hardly stand as a defense to a refusal to hire women.

If fear of potential tort liability were to excuse sex discrimination, such a result would undermine the goals of both Title VII and tort law. It would give the dirtiest, least technologically efficient, least safety conscious employers a built-in excuse for discriminating, because the more likely the prospect of actual tort liability, the stronger the defense to employment discrimination. Thus, incentives to provide as clean a workplace as reasonably feasible, to search for improved technology to even further reduce lead exposure, and to push ahead with the search for a lead-free battery would be greatly reduced. After all, so long as women are marginal workers in the formerly male-dominated lead battery manufacturing process, it will always appear easier, and less costly for employers to exclude women than to invest in technological improvements that might better the health of everyone. For this basic reason, the theory of law and economics must remain merely a fashionable academic theory to explain employer actions, rather than be turned into a loophole in Title VII law excusing employer actions that keep women in the home or in "women's work."

One fundamental tenet of tort law is that fear of liability is supposed to provide a deterrent to unsafe actions, and an incentive to constantly improve safety. This goal would be devastated if speculative tort liability could excuse a refusal to

hire women. The goal can only be accomplished if employers cannot avoid the specter of tort liability by avoiding women. Rather, employers must be encouraged, through the congruence of Title VII and tort law, to face up to their potential liability by making the workplace as safe as possible for women and men, and for the offspring of both sexes.

The responsible employer concerned about the health of future generation and tort costs has several viable options far short of excluding women. The responsible employer can meet all obligations imposed by the tort standard of care, can fully warn and inform workers of both sexes of the reproductive risks, and can continue to invest in reasonable technology and equipment to further reduce occupational lead exposure. The responsible employer can also allow workers of both sexes who wish to procreate to transfer temporarily, at no loss of pay or benefits, to positions that would enable them to lower their blood lead levels. The intersection of tort law with Title VII requirements, far from putting an employer between the proverbial rock and a hard place, encourages employers to work vigilantly to improve workplace safety.

II. THE ANIMAL STUDY DATA PRESENTED BY PLAINTIFFS PRECLUDES THE ENTRY OF SUMMARY JUDGMENT IN DEFENDANTS' FAVOR.

In order to enter summary judgment in Johnson Controls' favor, the majority below did not simply misinterpret Title VII. It also rejected plaintiffs' substantial evidence of reproductive harm to male workers by making an assertion that would astound any reputable practitioner of occupational or environmental medicine. The majority asserted that "animal research evidence does not present the type of solid scientific data necessary for a reasonable factfinder to reach a nonspeculative conclusion that a father's exposure to lead presents the same

danger to the unborn child as that resulting from a female employee's exposure to lead." 886 F.2d at 889-90.

This assertion is odd in light of the fact that the conclusion about risk to potential fetuses of nonpregnant women was itself so speculative. It is also curious in light of the fact that the level of risk Johnson Controls deemed acceptable for women was zero. But this assertion is also legally and scientifically untenable, because it rejects out-of-hand a type of data routinely and properly relied on by regulatory agencies in making risk assessments and experts when assessing causation.

In deciding that the level of lead exposure approved by OSHA was insufficient to protect a fetus if any of its women employees were to become pregnant, Johnson Controls was engaged in the same sort of risk assessment activity that regulatory agencies themselves are authorized by Congress to undertake. When OSHA set the lead standard and concluded that there was no basis for excluding fertile women because men also faced risks to their reproductive health at equal levels of exposure, it relied in part on animal studies for assessing both male and female mediated risks. Yet Johnson Controls presumed to substitute its judgment for the relevant federal regulatory agency that had engaged in painstaking factfinding by refusing *even to consider* an entire type of data relied on by OSHA. Moreover, the majority below compounded this error by presuming that judges without scientific training did not even have to consider the same types of evidence routinely relied on by scientists, medical experts, and regulatory agencies.

The enterprise of risk assessment remains fundamentally the same regardless of whether it is undertaken by an occupational or environmental medicine specialist, a regulatory agency, a jury, or an employer. Each risk assessor should have to consider the same types of evidence, particularly a type of evidence regarded as essential to the enterprise by medical science. Indeed, this Court has approved the use by regulatory

agencies of animal studies, *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980), as has the U.S. Court of Appeals for the District of Columbia Circuit on numerous occasions, *see, e.g., Environmental Defense Fund v. EPA*, 548 F.2d 998 (D.C. Cir. 1976); *EDF v. EPA*, 510 F.2d 1292 (D.C. Cir. 1975); *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479 (D.C. Cir. 1986). Dr. David Rall, the Director of the National Institute of Environmental Health Sciences of the National Institutes of Health, has observed that animal studies provide evidence to link a chemical to a disease that "is critical for the regulatory agencies that must make decisions to control chemicals, but it [animal study evidence] is also important to the physician and health care worker who needs to diagnose a disease that may be caused by a chemical." Rall, "Relevance of Results from Laboratory Animal Toxicological Studies", in J. Last, ed. *Public Health and Preventive Medicine* 515 (12th ed). Results of animal studies showing toxicity, carcinogenicity, and adverse reproductive outcomes have also been deemed highly relevant bases for concluding, in tort suits, that a manufacturer reasonably should have known of the risks to humans and thus should have warned humans. *See, e.g., Needham v. White Laboratories*, 639 F.2d 394 (7th Cir. 1981); *Bichler v. Eli Lilly & Co.*, 55 N.Y.S. 2d 571 (App. Div. 1982) (DES cases in which evidence from animal studies that DES could cross the placenta and cause cancer and abnormalities in female offspring lead to conclusion that manufacturers of the drug had a duty to warn about these risks).

If animal studies are to be precluded out-of-hand, as was done by the majority below, then the only public health alternative is for epidemiologists and experts in occupational and environmental medicine to wait until enough people have been injured or killed from toxic exposures that a large enough sample exists for making a statistically significant epidemiological calculation. This approach has been unanimously rejected by the medical and public health community. L. Gordis, *Epidemiology*

and Health Risk Assessment 37 (1988); J. Harrington & F. Gill, *Occupational Health* 99 (1987). It should similarly be rejected by the courts. *See, e.g., Ferebee v. Chevron Chemical Co.*, 552 F. Supp. 1293, 1301 (D.D.C. 1982), *aff'd*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984) ("A civilized legal system does not require that much human sacrifice before it can intervene.")

Animal studies drawn from exposed animal populations and epidemiological studies drawn from exposed human populations are complementary, interdependent methods. An epidemiologist will make an observation of an unexpected health phenomenon in some humans, which will trigger animal tests of the suspected agents. If these tests demonstrate toxicity, then the epidemiologist will use this finding to devise a human population study. Further animal studies may then be used to strengthen a causal inference revealed by the human study. Gordis, *Epidemiology*. "Without laboratory studies of animals, [scientists] could not estimate the substance's risks under conditions to which the human population may have been exposed, but for which epidemiologists have not and perhaps cannot control and for which epidemiological methods may lack required sensitivity." P. Schuck, *Agent Orange On Trial* 236 (1986).

While animal studies are not a perfect predictor of effects in humans, because of species and dose differences, they are nonetheless relied upon in the field of environmental and occupational medicine, and by regulatory agencies, for the following reasons:

> One of the questions commonly raised about carcinogenicity studies is why are animal studies relevant to humans. Some answers to this question include:
>
> (1) Most known human carcinogens are also animal carcinogens and many were first found to be carcinogenic in animals;

(2) Animals have long been used in a variety of toxicity tests and in most cases have been found to be excellent predictors of human toxicity;

(3) Animals and humans have many of the same metabolic pathways and responses to injury; and

(4) It is undesirable, to say the least, to use humans as experimental animals when other means exist to determine potential risk to humans.

D. G. Goodman, "Animal Testing of Carcinogens," 2 *Occupational Medicine: State of the Art Reviews* 43-49 (Jan.- March 1987); *see also* Rall, *supra* at 516, 519. These observations are no less valid for reproductive hazards that can have teratogenic effects on fetuses or mutagenic effects on sperm and eggs. *See* Office of Technology Assessment Task Force, *Reproductive Health Hazards in the Workplace* (1988).

The conclusion of the majority below that epidemiological evidence derived from human populations is inherently much more probative for determining risk to human beings than animal studies overestimates the usefulness of epidemiological studies just as it underestimates the importance of animal studies. While animal studies present the problem of extrapolating from one species to another, epidemiological studies present the problem of jumping from aggregate information about large numbers of humans previously exposed to predictions about risk to a particular individual with a different health level exposed to different amounts under different conditions. The point is not to disparage the usefulness of epidemiology — it is extremely useful in making risk assessments and drawing causal inferences — but to underscore that epidemiology is no more or less relevant than animal studies for determining causation or assessing risk. Any risk assessment that excludes data from animal studies —such as the risk assessment of male mediated reproductive harm engaged in by Johnson Controls and the majority below — is not a scientifically sound risk assessment.

In deciding that the risk to women of adverse reproductive outcomes was so much greater than the risk to men of adverse reproductive outcomes from lead exposure that women should be barred from jobs, Johnson Controls was functioning essentially as a regulatory agency. It ought to have to rely on the same kind of evidence that a regulatory agency would have to rely on in making the assessment of whether there is *some risk* to men from the current lead level in certain production jobs. The standard of "some risk" to men is the appropriate one because, by acting to exclude all fertile women regardless of childbearing plans or likelihood, Johnson Controls has effectively set the risk threshold for women at zero. *See* dissenting opinion of Judge Easterbrook, below. Moreover, if Johnson Controls' professed concern for the health of future generations is to be taken seriously, then the company should have to consider a wider variety of reproductive risks than those that operate on fetuses through women. It should have to consider the risk of malformed sperm that might produce fetal harm or even miscarriage, or reduced sperm count leading to sterility in men. As pointed out in Part I, the company's focus on a primarily female mediated risk — the kinds of reproductive harm presented once a fetus has already been created — is inherently discriminatory. This narrow focus fails to adequately protect reproductive health of men and women.

The company's narrow definition of the types of reproductive risks it will consider, coupled with its failure to consider animal study evidence about male mediated harm, amounts to a callous indifference to the reproductive health of men. Failure to consider animal studies is tantamount to saying to men, "Many of you will have to become sterile, many of you will have to suffer through your wives' miscarriages, many of you will have to shoulder the burden of damaged children, until such time as medical science produces more studies of men, and conclusive studies of men."

The law does not and should not require such sacrifice. The animal study evidence presented by plaintiffs, without more, requires reversal of the decision below.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be overturned.

Respectfully submitted,

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